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Petition

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81-955

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
ANNE M. GORSUCH, Administrator, and
PETER N. BIBKO, Regional Administrator,
Environmental Protection Agency,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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November 20, 1981

QUESTIONS PRESENTED

1. Whether an administrative agency may require an electrical utility to incur additional costs in excess of $150 million by enforcing a proposed regulatory requirement before the agency completes the pending rulemaking proceeding which the agency initiated to consider the requirement's desirability.

2. Whether an administrative agency's unexcused delay of almost three years in issuing a requested ruling on the scope of its regulations should be judicially approved in the face of an agency regulation expressly requiring the agency to issue the ruling within 30 days, where the ruling applicant repeatedly requested expedition and informed the agency that a delayed ruling would cause it serious injury, which in fact occurred.*

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* In addition to the parties named in the caption of this petition, Douglas M. Costle, formerly the Administrator of the respondent agency, and Jack J. Schramm, formerly its Regional Administrator for Region III, were respondents in the court of appeals.

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ANNE M. GORSUCH, Administrator, and
PETER N. BIBKO, Regional Administrator,
Environmental Protection Agency,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Potomac Electric Power Company, an electric utility doing business in the District of Columbia, Maryland and Virginia, petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 650 F.2d 509 and is reproduced at Appendix A. No opinion accompanied the order denying Petitioner's request for rehearing.

JURISDICTION

The judgment of the court of appeals was rendered June 4, 1981. *See* Appendix C, p. 29a. A timely petition for rehearing was denied on August 25, 1981. *See* Appendix C, p. 30a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Administrative Procedure Act governing the exercise by an administrative agency of power to adopt regulations which have the force of law. *See* 5 U.S.C. § 551(4), (5), (6), (7) and § 553. Also involved are the provisions of Section 111 of the Clean Air Act, 42 U.S.C. § 7411, which limit the scope of the authority conferred by that section to promulgate regulations restricting emissions of air pollutants by new stationary sources. The pertinent portions of these statutes are set forth at Appendix D.

REGULATIONS INVOLVED

Section 60.2 of Title 40 of the Code of Federal Regulations provides in pertinent part:

> "Commenced" means, with respect to the definition of "new source" in section 111(a)(2) of the Act, that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete within a reasonable time, a continuous program of construction or modification.

Section 60.5 of Title 40 of the Code of Federal Regulations provides:

(a) When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.

(b) The Administrator will respond to any request for a determination under paragraph (a) of this section within 30 days of receipt of such request.

STATEMENT OF THE CASE

The decision which this Petition seeks to have reviewed affirms a ruling by the United States Environmental Protection Agency ("EPA") that Unit No. 4 of Petitioner's Chalk Point Generating Station at Aquasco, Maryland did not commence construction before August 17, 1971, and hence is subject to new source performance standards proposed by EPA on that date under the Clean Air Act. The effect of the EPA decision is to cause Petitioner ("PEPCO") and its customers to incur additional costs in excess of $150 million. The questions presented for review are raised by the fact that the EPA ruling turns on a requirement which the agency has proposed in a pending but not-yet-completed rulemaking proceeding and by the fact that, notwithstanding repeated requests for expedition and an EPA regulation expressly requiring the agency to rule within 30 days, the ruling was not issued until nearly three years after the request was submitted.

A. The Regulatory Framework

Section 111 of the Clean Air Act ("the Act") authorizes EPA to promulgate emission standards for

so-called new stationary sources of air pollutants. These standards, termed new source performance standards or NSPS, are "technology based" in that, unlike provisions of the Act intended to prevent harmful levels of air pollutants, the NSPS require a new source to install the best demonstrated system of emission control whether or not the source's emissions would produce a harmful effect. *See* 42 U.S.C. § 7411(a)(1). *Compare, e.g.*, 42 U.S.C. §§ 7409, 7410, 7412. If emissions from a new or existing source will create an adverse effect, the source must comply with potentially more stringent "effects based" emission limits mandated by Sections 110 and 112 of the Act. 42 U.S.C. §§ 7410, 7412.

The authority to promulgate NSPS thus represents a decision by Congress to require advanced emission control irrespective of identifiable benefits when the technology can be "designed into" a source before construction begins, but not where installation will cause disruption and delay of ongoing construction or entail the added costs of retrofit. If construction has "commenced," the level of emission control is determined by other provisions, chiefly Sections 110 and 112 of the Act, which are concerned with the identification and prevention of any known adverse effect of an air pollutant. In no other provision of the Act are the terms of the legislative cost-benefit balance more important to achieving Congress' intent. By limiting Section 111 to sources which have not "commenced construction," Congress intended to limit NSPS to projects still in the design phase when a new NSPS is issued.[1]

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[1] Section 111 defines "new source" as "any stationary source, the construction or modification of which is commenced after the

In its regulations, EPA separately defines the words "commenced" and "construction." 40 C.F.R. § 60.2 (1981); Appendix D, p. 35a. These regulatory definitions provide that construction will be deemed to have commenced either (1) if a continuous "program of construction" has been "undertaken" or (2) if a "contractual obligation" to construct the stationary source has been "entered into."

By contrast, "commence" is defined for purposes of 40 C.F.R. § 52.21 (an analogous new source review program not applicable in this case) to mean either the initiation of a program of physical on-site construction or the execution of a contractual obligation "which cannot be cancelled or modified without substantial loss to the owner or operator . . . ." The quoted clause was

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publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance . . . ." (App. D., p. 34a.)

Both the Senate and House reports reflect Congress' understanding that the construction process begins with design and that Section 111 standards will have their effect at the beginning of this process. Thus, the Senate report's brief discussion of new source standards emphasizes that the provision is intended to require new stationary sources to be "designed, built, equipped, operated, and maintained so as to reduce emissions to a minimum." S. Rep. No. 91-1196, 91st Cong., 2nd Sess. 15 (1970). The House report contains a similar expression of intent to require new sources to be "designed and equipped" to include advanced emission control systems. H.R. Rep. No. 91-1146, 91st Cong., 2nd Sess. 10 (1970). The Senate report stresses the desirability of "preconstruction review of proposed plans for new facilities . . . ," thus making clear Congress' assumption that the applicable requirement will have been made known during the planning stages when changes in facility design can still be accomplished with minimal disruption and delay. S. Rep. No. 91-1196, *supra*, at 17.

added in 1977, as a result of legislation.[2] Before the 1977 amendment, the definition of "commence" at 40 C.F.R. § 52.21 was identical to the NSPS definition at § 60.2. In the 1977 legislation Congress could have similarly made loss a requirement for exemption from NSPS, but did not. The Senate report specifically states that the NSPS definition "excluded from coverage . . . those sources which had entered into binding obligations . . ., whether or not construction had actually begun or whether there would be any substantial loss if the contract was cancelled or modified." S. Rep. No. 95-127, 95th Cong., 1st Sess. 32-33 (1977).

On May 31, 1979, EPA proposed to add the same loss requirement to the NSPS definition of "commenced," which has been in effect since 1971.[3] The 1979 proposal clearly reflects EPA's recognition that the unamended NSPS regulation does not contain a loss requirement. Recognizing that the addition of such a requirement would effect a major change, EPA expressly reassured regulated persons that the new definition will have prospective application only, and moreover, that it will not apply to a source which on the date of promulgation of a final rule would be deemed to have commenced construction if the unamended regulation had re-

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[2] Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685, § 127(a) (1977), 42 U.S.C. § 7479(2)(A); *see* 40 C.F.R. § 52.21 (b)(8). This law modified EPA's program for "prevention of significant deterioration" ("PSD program") in various ways. Unlike the NSPS program, the PSD program is concerned primarily with facility siting and with effects on air quality levels. By defining "commenced construction" for PSD purposes to require "substantial loss," Congress was willing to impose serious disruption costs in order to compel sources to avoid prohibited air quality impacts by switching sites.

[3] *See* 36 Fed. Reg. 24,877 (December 23, 1971).

mained in effect. Thus, the *Federal Register* preamble states:

> EPA does not intend that sources would be brought under the standards by the revised definitions that would not have been covered by the existing definitions. The revised definitions would be effective 30 days after promulgation of the final definitions. Facilities which have commenced construction under the present definitions before the effective date of the revised definitions, would be considered to have commenced construction under the revised definitions, *i.e.*, the revised definitions would not be applied retroactively.[4]

The 1979 proposal to amend the NSPS definition of "commenced" is still pending.

If requested to do so by an owner or operator of a planned stationary source, EPA's regulations require the Administrator of EPA to determine whether in his judgment construction has "commenced" within the meaning of the NSPS regulations. *See* 40 C.F.R. § 60.5(a) (1981); Appendix D, p. 35a. The regulation expressly requires the Administrator to make this determination within 30 days of receipt of such a request. *See* 40 C.F.R. § 60.5(b) (1981); Appendix D, p. 35a.

B. Proceedings Before EPA

On May 20, 1977, PEPCO asked the Administrator of EPA to determine whether PEPCO's Chalk Point Unit 4 was subject to the NSPS for steam electric power plants at 40 C.F.R. subpart D, which were first proposed on August 17, 1971.[5] PEPCO's request relied

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[4] 44 Fed. Reg. 31,596 (May 31, 1979).

[5] 36 Fed. Reg. 15,704 (August 17, 1971).

on the regulation's contractual test and accordingly called EPA's attention to contracts for construction entered into before the 1971 proposal date. The request contained a sworn recitation of relevant facts and was accompanied by a 156-page appendix of pertinent documents.

EPA made no response whatever for fifteen months. Then, on August 17, 1978, EPA requested additional information. The EPA letter stated that the agency had "preliminarily determined" that the 1971 NSPS were applicable to Chalk Point Unit 4 but that additional information was needed to determine the "exact status" of the unit. As reasons for its preliminary determination, EPA pointed to requirements in its regulation having to do with the continuity and length of the construction program. *See* C.F.R. 60.2 (1981); Appendix D, p. 35a. No suggestion was made that PEPCO's contractual obligations to construct Unit 4 had not been entered into before August 17, 1971, or that these contracts in any other way failed to satisfy the regulatory requirement that a contractual commitment precede proposal of an NSPS.

In supplying the requested information PEPCO asked "that this matter be expedited to the maximum extent possible." PEPCO's letter explained that if the ruling was delayed "it may be extremely difficult to retrofit the unit with . . . new equipment while still achieving the unit's projected in-service date."

Despite repeated requests by PEPCO that EPA expedite its NSPS determination, EPA's adverse decision was not issued until March of 1980, nearly three years after PEPCO's ruling request was submitted.[6]

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[6] 45 Fed. Reg. 20,155-56 (March 27, 1980); Appendix B, p. 25a.

The final ruling makes no reference to the continuity or length of the construction program, which had been the only objections stated in EPA's 1978 letter. Instead, the final EPA ruling places exclusive reliance on a totally different objection that PEPCO had failed to establish that cancellation of its contract with the Unit 4 boiler fabricator would entail "substantial loss." The new ground for objection was not made known to PEPCO until more than two years after its ruling request was submitted.

PEPCO petitioned for review of EPA's ruling pursuant to 42 U.S.C. § 7607(b).

C. The Decision of the Court of Appeals

In affirming EPA's imposition of a loss requirement in applying the NSPS definition of "commenced", the court of appeals rejected PEPCO's arguments that congressional intent precludes such a requirement and that, in any event, EPA's current regulations do not impose a loss requirement and must be amended to do so.[7] Since the loss requirement necessarily implies that a contractor has initiated performance (by loss, both EPA and the court of appeals clearly meant liability in damages to a performing contractor), the court in effect overrode Congress' intent to impose NSPS only where advance technology can be "designed into" a source before construction begins.

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[7] The EPA ruling (by its Regional Administrator in Philadelphia) required PEPCO to prove "substantial loss." On appeal, the government brief substituted "significant" for "substantial" in describing the loss test. The court of appeals used the government's phrase on the ground that the extent of loss or liability was not important on the facts of the case. *See* 650 F.2d at 520, n.3; Appendix A, p. 22a-23a, n.3.

The court below construed the relevant statutory provisions to confer wide discretion on EPA and relied heavily on policy arguments advanced in the government's brief but not relied on by the agency. *See* 650 F.2d at 512-515; Appendix A, pp. 5a-13a. This line of reasoning ignores the main thrust of PEPCO's argument that, even if discretion exists to achieve a policy objective by establishing a loss requirement, EPA must do so by amending its applicable regulation.

The court below also rejected PEPCO's argument that the EPA decision improperly limited consideration to PEPCO's contractual obligation to construct the Unit 4 boiler, rejecting, for example, PEPCO's more important and costly commitments to other contractors, such as the project's general contractor. *See* 650 F.2d at 515; Appendix A, p. 13a.

In an early footnote, the court of appeals summarily dismissed PEPCO's objection to EPA's three-year delay in issuing the ruling. *See* 650 F.2d 510, n.1; Appendix A, p. 2a, n.1.

REASONS FOR GRANTING THE WRIT

Two issues are presented for review by this Court. The first concerns the power of an administrative agency to expand requirements set forth in the agency's published regulations without complying with the notice and comment procedures of the Administrative Procedure Act ("APA"). This issue tests the boundaries of the basic principle that power to prescribe should be exercised prospectively with advance notice to and participation by all affected persons. It is raised with unusual clarity in this case because the challenged decision unquestionably turns on an

anticipatory imposition by the agency of a requirement which is the subject of a pending but not-yet-completed rulemaking.

The second issue concerns application in a new area of the important and related principle that an agency is bound by its own procedural regulations until they are duly revised. By delaying its ruling for almost three years in this case, the agency committed an egregious violation of its regulation requiring a ruling within 30 days.

Both issues involve questions of exceptional importance in areas of administrative law where lower federal courts need guidance. The decision below is in conflict with decisions of other federal courts.

I.

EPA Must Be Required to Complete Its Pending Rulemaking Before Applying a Requirement Not Contained in the Unamended Rule

EPA has defined "commencement of construction" for NSPS purposes in a regulation which states in relevant part that construction commences when a source owner "has entered into" a "contractual obligation" to construct the source. *See* 40 C.F.R. § 60.2 (1981); Appendix D, p. 35a. The agency has formally proposed to amend this regulation. Under the rule as it is proposed to be amended, a loss requirement would be added so that a contractual obligation by itself would no longer constitute commencement of construction for NSPS purposes. By initiating the pending rulemaking, EPA has clearly recognized that under the existing regulation a contractual obligation is sufficient by itself. In addition, Congress has expressed

its understanding that the current NSPS definition does not include a loss requirement. *See* page 6, *supra*.

The question here raised is not whether the EPA has statutory power to adopt and apply a loss requirement in defining "commenced construction" for NSPS purposes. (PEPCO argued in the court of appeals that the proposed loss requirement is incompatible with the statute.) Nor does PEPCO seek to re-argue here the question of whether the government's various policy arguments are sound. (PEPCO contended in the court of appeals that the policy arguments make no sense, are internally inconsistent, and represented *post hoc* rationalization since they were not relied on by the agency.) The question which warrants review by this Court is the more basic one of whether an agency may impose a proposed new regulatory requirement in an adjudicative decision before the agency's pending rulemaking proceeding is completed. The court of appeals' approval of the EPA action in this case strikes at the foundation of the APA's distinction between an agency's rulemaking and adjudicative powers and implicates basic questions of fairness and predictability in the regulatory process.

Rulemaking by administrative agencies is a delegated legislative function which is concerned with the development and articulation of policy and the delineation of general rules for future conduct by regulated persons. Procedural requirements are designed to inform interested persons of prospective requirements, stimulate views and comments relevant to the agency's stated objectives and to the proposed means of achieving them, and provide time for regulated persons to comply. The fact finding function is not usually of critical importance. As a result, the adversarial and

evidentiary emphasis of the adjudicative process is wholly absent from the notice and comment procedure that applies to the adoption of most rules. The principle of prospectivity is, however, fundamental. Regulated persons must, at a minimum, be informed in advance so that they can plan their operations in ways which take proposed new requirements into account. Attempts by agencies to impose retroactive rules raise serious questions of fairness and are disfavored.

The altogether different kinds of procedural requirements that apply in adjudication are designed to assure fairness and accuracy in an agency's determination of particular facts. Retroactivity is not a primary concern because the adjudicative function is primarily concerned with the application of previously established rules to particular cases. Tension occurs where general rules have been inadequately formulated, requiring a degree of "interpretation" which is more prescriptive than adjudicative. Although the distinction between interpretation and prescription is not easy to draw, the structure and intent of the APA requires that agencies employ rulemaking procedure to achieve clearly prescriptive objectives and that adjudicative results be compatible with previously established rules where they exist.

The importance of this basic distinction between rulemaking and adjudication has been recognized in numerous court decisions, in the treatises on administrative law, and in the writings of commentators. *See, e.g., NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969); *id.* at 780-81 (Harlan, J., dissenting); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947); *cf., Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979). *See generally*, 2 Davis, *Administrative Law Treatise* §§ 7.2,

7.3 (1979); Mayton, "The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking," 1980 Duke L.J. 103. While the choice between rulemaking and adjudication lies initially within the agency's discretion, this Court has put agencies on notice that a clearly inappropriate use of adjudication to establish prescriptive norms or to articulate new policy may be an abuse of discretion. *See, e.g., NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). As the plurality opinion states in *NLRB* v. *Wyman-Gordon Co., supra,* at 764:

> The rule-making provisions of [the APA] . . . were designed to assure fairness and mature consideration of rules of general application . . .. They may not be avoided by the process of making rules in the course of adjudicatory proceedings.[8]

In *Morton* v. *Ruiz,* 415 U.S. 199 (1974), this Court struck down an eligibility requirement imposed by the Bureau of Indian Affairs on the ground that the

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[8] The Court's decision in *Wyman-Gordon* upholds an order of the National Labor Relations Board requiring an employer to furnish a list of eligible employees to unions seeking certification. Four opinions were filed. The plurality and concurring opinions stress the Board's supervisory power over elections and further emphasize that the requirement to provide a list of employees was "incident of the adjudication of a specific case before it" and "part of the order directing that an election be held . . .." *See* 394 U.S. at 766, 770, 773. In this case, EPA possesses no similar authority to supervise the manner in which a stationary source is constructed. Nor does EPA claim to have exercised adjudicatory power to vary the statutory limitation on the scope of an NSPS on the basis of the special circumstances of each case. Rather, EPA has purported to implement a general requirement for all cases. In these circumstances, resort to the EPA's rulemaking procedure is required under the Court's opinion and both dissents in *Wyman-*

agency should have established the requirement by rulemaking. The opinion observes:

> The Administrative Procedure Act was adopted to provide, *inter alia,* that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations. 415 U.S. at 232

In *Patel* v. *Immigration and Naturalization Service,* 638 F.2d 1199 (9th Cir. 1980), the Court of Appeals for the Ninth Circuit held that the Immigration and Naturalization Service ("INS") abused its discretion when it supplemented existing regulations through adjudication. At issue in *Patel* was an alien's eligibility for permanent resident status under INS regulations which create an "investor exemption" to a general requirement of Labor Department certification. Patel met the regulatory criteria for the "investor exemption" but was deemed unqualified by the INS for failure to establish that his proposed investment tended to expand job opportunities in the United States, a requirement not stated in the regulation but

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Gordon. *See, e.g.,* 394 U.S. at 764 ("there is no warrant in law for the Board to replace the . . . [APA] scheme with a rule-making procedure of its own invention") (opinion of Mr. Justice Fortas for the Court); *id.* at 777, 779 (where a requirement "is designed to fit all cases at all times . . . I would hold the agencies governed by the rule making procedure strictly to its requirements . . .") (dissenting opinion of Mr. Justice Douglas); *id.* at 781 ("if . . . . the NLRB may properly enforce an invalid rule in subsequent adjudications, the rule-making provisions of the Administrative Procedure Act are completely trivialized") (dissenting opinion of Mr. Justice Harlan).

applied in two previous decisions.[9] Citing this Court's decisions in *Chenery, Wyman-Gordon* and *Bell Aerospace, supra,* the Ninth Circuit squarely held that it was improper for the INS, through adjudication, "to add a job-creation requirement to an already clear regulation." 638 F.2d at 1201.[10]

The factual similarity between this case and *Patel* is striking. In both cases the agency purported to interpret an existing regulation to contain an unstated requirement. In both cases the result was to narrow the scope of an exemption. In *Patel,* as here, the agency had previously initiated rulemaking for the purpose of adding the new requirement. Thus, the Ninth Circuit's opinion emphasizes:

> [T]he INS itself had recognized the desirability of establishing a job-creation standard by rule making when it proposed the 1973 regulation. . . . The INS eventually failed to include the job-creation standard in its rule. Under the authority of Wyman-Gordon, we conclude that if the INS wished to add the job-creation criterion, it should have done so in a rulemaking procedure. 638 F.2d at 1204, citing, *e.g.,* 2 Davis, Administrative Law Treatise § 7.25 at 124 (1979).[11]

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[9] *See In re Ruangswang,* I.D. 2546 (BIA 1976), *rev'd sub. nom Ruangswang* v. *Immigration and Naturalization Service,* 591 F.2d 39 (9th Cir. 1978); *In re Heitland,* 14 I. & N. Dec. 563 (BIA 1974), *aff'd sub. nom Heitland* v. *Immigration and Naturalization Service,* 551 F.2d 495 (2d Cir. 1977), *cert. denied,* 434 U.S. 819 (1977).

[10] The court of appeals affirmed the agency's denial of Patel's application for suspension of his deportation status. 638 F.2d at 1205-06.

[11] In *Patel* the INS had proposed to add a job-creation requirement to its investor exemption regulation in 1972. The final regu-

In both cases the agency claimed that the additional requirement had been applied in earlier agency rulings.[12]

The decision below is also in direct conflict with the Ninth Circuit's more recent decision in *Ford Motor Co.* v. *FTC*, 654 F.2d 599 (9th Cir. 1981). In the *Ford Motor* case, the court disapproved an FTC adjudicative order which applied a concept of unfair trade practice not explicit in an applicable trade practice rule. The court in *Ford Motor* announced the following test, which it derived from the earlier *Patel* holding:

> "[A]gencies can proceed by adjudication to enforce discrete violations of existing laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application." 654 F.2d at 601.

The challenged decision in this case imposes a loss requirement of general applicability in applying the terms of a regulation which contains no such requirement, as both Congress and the agency have previously recognized. The desirability of applying such a requirement is in fact a principal focus of consideration in a pending but not-yet-completed rulemaking. In these circumstances, the court of appeals' approval of EPA's action is tantamount to the rejection of *any*

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lation in that rulemaking, adopted in 1973, did not contain the job-creation requirement. A job-creation requirement was added in a later rulemaking not applicable to *Patel*. *See* 638 F.2d at 1202.

[12] *See* 638 F.2d at 1202. In this case the Fourth Circuit agreed with EPA that the Chalk Point 4 ruling is consistent with earlier EPA rulings, rejecting PEPCO's argument that the ruling misinterpreted earlier EPA rulings. *See* 650 F.2d 514-15; Appendix A, pp. 10a-11a.

limits on the power of an agency to disregard rulemaking procedures in establishing new requirements of general application. The result is in direct conflict with the Ninth Circuit's *Patel* and *Ford Motor* decisions.

The issues raised by EPA's anticipation of the results of its rulemaking proceeding concern not only the integrity of the APA's separate procedures for rulemaking and adjudication but also the basic fairness and predictability of regulation. The formulation of judicial rules dealing with the limits of an administrative agency's discretion to develop and impose new regulatory requirements by adjudicative rather than rulemaking techniques warrants this Court's attention.

The sharp conflict in results reached by two federal courts of appeal underscores the need for review by this Court at this time.[13] In addition, because the agency in this case has clearly anticipated the outcome of a pending rulemaking, its action implicates even the least restrictive limitations on the power of agencies to evade rulemaking procedures by engaging in prescriptive adjudication. This case is especially well suited therefore to the establishment of general guidance by this Court concerning the boundaries of agency discretion in this important area of administrative law.

II.

EPA's Egregious Violation of Its Own Procedures Raises Issues Which Warrant Review By This Court

EPA's three-year delay in issuing its ruling was an indefensible violation of the agency's own regulation,

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[13] *See* Rules of the Supreme Court of the United States (1980), Rule 17.1(a); *cf. Corning Glass Works* v. *Brennan*, 417 U.S. 188, 190-91 (1974).

which imposes on the agency an unequivocal duty to respond to a ruling request within 30 days. *See* 40 C.F.R. § 60.5(b) (1981); Appendix D, p. 35a. The delay in this case occurred in the face of repeated requests for expedition. EPA has offered no excuse for the delay. PEPCO suffered serious injury as a result of the delay, and EPA was forewarned that this injury would occur. The 30-day requirement was clearly intended to protect regulated persons, such as PEPCO, and is in no sense a mere procedure for the internal management of the agency. The court of appeals' holding that no judicial remedy exists to protect persons who are injured by inattention and irresponsibility of this magnitude represents an important curtailment of the operation of accepted safeguards against the abuse of governmental power and warrants review by this Court.

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton* v. *Ruiz,* 415 U.S. 199, 235 (1974); *see United States* v. *Caceres,* 440 U.S. 741, 754 (1979). Under the *Morton* rule, an agency's departure from its regulatory procedures may be permissible if the purpose and effect of the rule is limited to internal operations of the agency or to staff management. In such cases, the impact of the deviation is felt primarily by the agency. *See American Farm Lines* v. *Black Ball Freight Serv.,* 397 U.S. 532, 539 (1970). On the other hand, when an agency fails to abide by regulations which are intended to protect outsiders, private rights are violated and the agency's action is invalid. *See Vitarelli* v. *Seaton,* 359 U.S. 535 (1959). *See generally*

Note, "Violations by Agencies of Their Own Regulations," 87 Harv. L. Rev. 629 (1974). As the Fourth Circuit itself emphasized in *United States* v. *Heffner*, 420 F.2d 809, 811 (4th Cir. 1970), "an agency of the government must scrupulously observe rules, regulations, and procedures which it has established . . . ."

The court of appeal's disposition of these important principles was casual and plainly inadequate. The opinion distinguishes a case in which the plaintiff sought an injunction to compel the agency to act but ignores cases dismissing suits by agencies to enforce a requirement which the agency had imposed after an unreasonable delay.[14] *See* 650 F.2d at 510, n.1; Ap-

[14] For example, in *EEOC* v. *Liberty Loan Corp.*, 584 F.2d 853 (8th Cir. 1978), a government enforcement suit alleging violation of Title VII of the Civil Rights Act of 1964 was dismissed because of unreasonable delay in the administrative determination of unlawful discrimination. In *Liberty Loan*, unlike this case, no regulation prescribed a mandatory period for action by the administering agency. As a result, the district court in *Liberty Loan* was required to infer a defense to enforcement of the statutory prohibition against discrimination from the statutory grant of judicial power to compel agency action wrongly delayed (5 U.S.C. § 706 (1)). The court of appeals affirmed on the different ground that a federal court has discretionary power to provide appropriate equitable relief, including protection from enforcement, when a defendant has been prejudiced by the unreasonable delay of an administrative agency. *See* 584 F.2d at 856, quoting *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 373 (1977).

In this case the court below ignored cases like *Liberty Loan*. The court distinguished *Deering Milliken Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961), and *EEOC* v. *Raymond Metal Products Co.*, 385 F. Supp. 907 (D. Md. 1974), *aff'd*, 530 F.2d 590 (4th Cir. 1976), suggesting (erroneously) that these two cases stand for the proposition that an order under 5 U.S.C. § 706(1) compelling action unreasonably delayed is the exclusive judicial remedy for violation of an agency's duty under 5 U.S.C. § 555(b) to conclude a pending matter within a reasonable time.

pendix A, p. 2a, n.1. As a second ground for upholding the EPA ruling the court below stated that because PEPCO did not request a ruling until 1977 "PEPCO would be estopped from asserting any prejudice . . . ." *Id.* The estoppel argument overlooks the fact that PEPCO would have suffered no prejudice if EPA had ruled within 30 days, as its regulation requires. Indeed, PEPCO would have avoided the most serious injury if EPA had ruled within two years instead of three.[15] In any event, nothing in EPA's regulation requires a source owner to seek a ruling at the earliest possible moment, or indeed at any time. PEPCO was entitled to assume that EPA would comply with its own regulation.

The court's cryptic estoppel suggestion lacks serious consideration and cannot obscure the fact that judicial affirmance of the EPA ruling sanctions a form of irresponsible agency behavior which should not be tolerated. Lengthy and unjustified delay in defiance of an agency's own procedures is no less important in its impact on the public, and is frequently more important, than a large number of decisional errors which are routinely reversed by courts. This case itself well illustrates the serious effects of unreasonable delay in agency decisionmaking.

It warrants emphasis that the agency in this case has advanced no reasons for a delay which it knew would be highly prejudicial to PEPCO and which oc-

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[15] By delaying more than 30 days, EPA deprived PEPCO of the option to comply with NSPS by installing emission control systems. By delaying more than two years, EPA created doubt that PEPCO could comply by any means, including purchase of low sulfur fuel, and hence brought into question the availability of the unit at the scheduled in-service date.

curred in the face of numerous requests for expedition. The record certified by EPA to the court below discloses repeated periods of six or more months in which no action of any kind occurred, other than the receipt and filing of PEPCO's requests for a prompt decision.

Review by this Court would provide an opportunity for the establishment of needed guidance on the effects of unreasonable administrative delay and on the important question of remedies. These are areas of present uncertainty where the administrative agencies would themselves benefit from a more complete explication of applicable legal principles by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted and the case set for plenary review.

Respectfully submitted,

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November 20, 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 80-1255

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS M. COSTLE, Administrator, and JACK J. SCHRAMM, Regional Administrator, Environmental Protection Agency, *Respondents.*

Argued Nov. 12, 1980

Decided June 4, 1981

Before WIDENER, PHILLIPS and ERVIN, Circuit Judges.

JAMES DICKSON PHILLIPS, Circuit Judge:

The Potomac Electric Power Company (PEPCO) has petitioned this court, pursuant to § 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), for review of a decision of the Environmental Protection Agency (EPA), through one of its regional administrators, finding that the boiler at PEPCO's Chalk Point Unit # 4 electric generating station is subject to the new source performance standard (NSPS), *see* 40 C.F.R. § 60.40 *et seq.*, promulgated by the EPA for fossil fuel-fired steam generating units under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* The regional administrator's decision was based on his determination that PEPCO had not "commenced construction" of the Chalk Point Unit # 4 boiler prior to EPA's publication of the relevant NSPS on August 17, 1971.

Two questions are presented by PEPCO's petition for review of the regional administrator's decision.[1] First, is the EPA's interpretation of the regulations it has promulgated for determining whether an NSPS is to be applied to a particular facility "plainly erroneous"? Second, was the regional administrator's decision, on application of the EPA's regulations and interpretation of those regulations to the facts of this case, arbitrary, capricious or an abuse

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[1] PEPCO has also contended that it is entitled to relief from the ruling in any event because of the regional administrator's delay in making his determination. We find this contention to be without merit for two reasons.

First, although PEPCO cites a number of cases in which federal courts have compelled by injunction agency action wrongfully withheld in violation of a statutory duty, *see, e. g., Deering Milliken, Inc. v. Johnston*, 295 F.2d 856, 861-64 (4th Cir. 1961) and 5 U.S.C. § 706(1) provides the authority to "compel agency action . . . unreasonably delayed," as the court found in *EEOC v. Raymond Metal Products Co.*, 385 F.Supp. 907, 914 (D.Md. 1974), *aff'd*, 530 F.2d 590 (4th Cir. 1976), § 706(1) "was clearly intended for situations where an agency has *failed to take* appropriate action and not for situations . . . where the agency action *has been taken* in an allegedly unreasonable time." (Emphasis added.)

Second, even if this court were to recognize PEPCO's potential right to relief, we believe PEPCO would be estopped from asserting any prejudice resulting from the EPA's delay in acting on its request for an NSPS exemption by its own lengthy delay in requesting that exemption. Although PEPCO began construction on its Chalk Point Unit # 4 facility in late 1971, it did not ask for a ruling on the applicability of the NSPS to that facility, which PEPCO admittedly had the burden of requesting, 40 C.F.R. § 60.5 (a), until 1977. PEPCO suggests that it only discovered the possibility of the NSPS' applicability to this facility two months prior to its request for a ruling. In view of the fact that several other utilities had long before requested rulings in this precise matter, we think that this major utility must be charged with at least constructive notice at a much earlier time, saving any question of actual notice.

of discretion. Answering both questions in the negative, we affirm the decision of the regional administrator that PEPCO's Chalk Point Unit # 4 must comply with the NSPS promulgated for fossil fuel-fired steam generators.

I

Because the decision of the EPA concerning the applicability of an NSPS to a particular facility turns largely upon the facts of each case, a brief review of the facts underlying PEPCO's present petition for review is essential for an understanding of our disposition of this appeal. Chalk Point Units # 3 and # 4 are two of the four electric generating facilities that collectively comprise PEPCO's Chalk Point Generating Station south of Aquasco, Maryland. At the core of each unit is an oil-fired boiler designed to generate steam to power a turbine that produces electricity. The two units share several ancillary facilities, including a common water treatment system, fuel oil tank farm and control room, and a single building houses the boilers and turbines for both units. Units # 3 and # 4 were planned in the late 1960's as a single procurement and were to be placed in service "back to back" in 1974 and 1975. A sudden and unprecedented decline in electricity use following the Arab Oil Embargo of 1973, however, caused construction of both units to be slowed after their commencement. Unit # 3 was placed in service in 1975; Unit # 4 is scheduled to go into operation in the fall of 1981.

The information that PEPCO later submitted to the EPA indicates that negotiations for the construction of Unit # 4 were commenced in 1970 and that PEPCO was dealing primarily with General Electric (GE), United Engineers & Constructors (UE&C) and Combustion Engineering (CE). PEPCO's negotiations with GE were for the main turbine-generator and boiler feed pump turbines. On March 12, 1971, PEPCO awarded the order to GE subject to the final approval of PEPCO's board of directors and mutually agreeable contract terms. On March 25,

1971, GE confirmed the order but stipulated that PEPCO could cancel the order without charge up to the earlier of the 30-month period prior to shipment or the release of the units for engineering and manufacturing. On June 30, 1971, PEPCO notified GE of approval of the order by its board of directors. On August 2, 1971, the units were released by GE for design and manufacture. A formal contract for the units, however, was not signed until April 23, 1973.

PEPCO's negotiations with UE&C were for engineering and construction services at the Chalk Point site. The contract for these services was signed on November 12, 1974 but had an "effective date" of April 12, 1971. This contract covered services for both Units # 3 and # 4. Prior to August 17, 1971, UE&C had developed drawings that indicated the planned construction of Unit # 4. Site preparation for Unit # 4, however, did not begin until late 1971.

PEPCO's negotiations with CE were for fabrication of the boiler to be used in Unit # 4. On August 17, 1970, PEPCO received a price quotation from CE on a boiler unit for an undetermined facility; that boiler was eventually used in Unit # 4. A CE "Parts Shipment Forecast" dated February 18, 1971 listed this unit for initial parts shipment during the first quarter of 1973. The unit was listed as a "Forecast Unit" that was identified by an internal control number as contrasted to listing as a "Booked Unit" identified by a domestic contract number.

On March 11, 1971, CE stated in a letter to PEPCO that it had committed space in its production schedule for the Unit # 4 boiler pending a final decision by PEPCO. Also included in the letter were a price quotation and a projected delivery date. On July 12, 1971, PEPCO sent a letter to CE stating that "we are now considering a design for proposed Chalk Point No. 4." This letter concluded with the statement that, "[s]ubject to a mutually satisfactory contract, it is our intent to award the No. 4 boiler unit to you." This letter also referred to a meeting between

PEPCO and CE to be held on August 3, 1971 to review a design proposal for Unit # 4.

Although a CE engineering and production team began to design the Unit # 4 boiler after CE's August 3 meeting with PEPCO, no subcontracts were let or materials acquired prior to August 17, 1971. On October 26, 1971, CE prepared a "Contract Abstract" for Unit # 4 that included descriptions of the major boiler components, the total price, shipping and payment conditions, and an "award date" of July 12, 1971.

A formal contract for the Unit # 4 boiler was not executed until April 18, 1973, at which time fabrication of the boiler was 75% complete. Affidavits later sworn to by PEPCO's Vice President for Nuclear Engineering and Environmental Affairs and CE's principal representative in the boiler negotiations, however, indicate that the parties felt that they had a binding agreement based on PEPCO's letter of July 12, 1971.

Construction of Chalk Point Unit # 4, although slowed or "deferred" as a result of the 1973 oil embargo, has continued substantially uninterrupted to the present day. It was not until May 20, 1977, however, that PEPCO, pursuant to 40 C.F.R. § 60.5(a), requested a ruling from the EPA on whether Unit # 4 would be subject to the NSPS for fossil fuel-fired steam generating units published by the EPA on August 17, 1971. Appended to this request were 156 pages of pertinent documents.

Fifteen months after receiving PEPCO's request, EPA communicated its first response to PEPCO—a request for further information. This request, dated August 17, 1978, stated that the EPA had "preliminarily determined" that Unit # 4 was subject to the 1971 NSPS for steam electric plants but requested additional information to determine the "exact status" of the unit. The reasons given for the EPA's preliminary determination were that construction of Unit # 4 had been neither continuous nor of reasonable

length, as required by 40 C.F.R. § 60.2(i). PEPCO supplied the requested information and urged that the EPA make its decision "just as quickly as possible."

At a meeting requested by PEPCO that took place on July 3, 1979, the EPA informed PEPCO for the first time that its ruling would turn on the question whether a "contractual obligation" to construct the Unit # 4 boiler existed before August 17, 1971. Following PEPCO's compliance with two more EPA requests for information, the EPA staff briefed the regional administrator in October 1979 and again in March 1980. His final ruling on PEPCO's Chalk Point Unit # 4 request was published on March 27, 1980. 45 Fed.Reg. 20,155 (1980). In this ruling the regional administrator determined that, because PEPCO had not entered into a "contractual obligation" on the Unit # 4 boiler—the "affected facility" in the present case—PEPCO had not "commenced construction" at its Chalk Point Unit # 4 prior to the EPA's publication of the NSPS for steam electric plants on August 17, 1971. He therefore concluded that the NSPS for steam electric plants was applicable to Unit # 4.

II

Before addressing the specific issues raised by this appeal, a brief discussion of the regulatory scheme out of which they arise is essential. Section 111 of the Clean Air Act, 42 U.S.C. § 7411, requires that the EPA promulgate new source performance standards (NSPS), reflecting the best demonstrated pollution control technology, for application to any new stationary source, "the construction or modification of which is commenced after the publication of [the NSPS] applicable to such source." The only statutory guidance that the EPA is given in promulgating the NSPS, however, is the definition of "stationary source" in § 11(a)(3) of the Clean Air Act, 42 U.S.C. § 7411(a)(3), as "any building, structure, facility, or installation which emits or may emit any air pollutant."

Based on this loosely defined statutory authorization, the EPA has promulgated a detailed regulatory scheme establishing and implementing the NSPS. *See* 40 C.F.R. Part 60. Included in this regulatory scheme is a subpart dealing with the procedural applications of the NSPS that are established in other subparts, *see id.* Subpart A, which is applicable "to the owner or operator of any stationary source which contains an *affected facility*, the *construction* or modification of which is *commenced* after the date of publication in this part of any standard applicable to that facility," *id.* § 60.1 (emphasis added). The term "affected facility" is defined as "any apparatus to which a standard is applicable." *Id* § 60.2(e). The word "construction" is defined as the "fabrication, erection, or installation of an affected facility." *Id.* § 60.2(g). The word "commenced" is defined to require a showing "that an owner or operator has entered into a *contractual obligation* to undertake and complete, within a reasonable time, a continuous program of construction or modification." *Id.* § 60.2(i) (emphasis added).

Based on its interpretation of the regulations it has promulgated pursuant to the authorization of § 111 of the Clean Air Act, 42 U.S.C. § 7411, the EPA has contended that PEPCO's Chalk Point Unit # 4 is subject to the NSPS for steam electric plants because PEPCO was unable to establish that, prior to the EPA's publication of the applicable NSPS on August 17, 1971, it had entered into a "contractual obligation" for "construction" of its Unit # 4 boiler—which the EPA contends is the "affected facility"—so that PEPCO could not cancel that obligation without incurring "significant liability," either because an agreed upon cancellation fee had come into operation or because the manufacturer of the facility had made expenditures in reliance upon an agreement for construction of the facility. PEPCO, on the other hand, has contended that, under well-settled principles of contract law, it had entered into a "contractual obligation" for the construction of

Chalk Point Unit # 4 generating station, based either on its contract with UE&C to construct the entire Unit # 4 generating station—which PEPCO contends is the "affected facility"—or on its contract with CE to construct the boiler that is to be used in that generating station.

We note at the outset that some of PEPCO's contentions may be read as challenging not only the EPA's interpretation of its regulations but also the regulations themselves. To the extent that the regulations themselves are challenged, the challenge is untimely and in the wrong court; section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), requires that challenges to EPA regulations of nationwide applicability be brought within 60 days of promulgation in the United States Court of Appeals for the District of Columbia Circuit. Since the procedural regulations governing application of the NSPS that are now under consideration were promulgated by the EPA on December 23, 1971, *see* 36 Fed.Reg. 24,876 (1971), any challenge to those regulations could only have been brought in the District of Columbia Circuit on or before February 23, 1972. This court therefore has jurisdiction to review only the EPA's interpretation of those regulations, and the scope of that review is limited to whether the EPA's interpretation is plainly erroneous. *See Udall v. Tallman,* 380 U.S. 1, 16-17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Talley v. Mathews,* 550 F.2d 911, 919 (4th Cir. 1977).

A.

With respect to whether a "contractual obligation" was entered into for Unit # 4 prior to publication of the applicable NSPS, PEPCO has argued persuasively that it had entered binding contracts with UE&C and CE prior to August 17, 1971 or, at the very least, it was liable to those companies on a theory of promissory estoppel. However, while principles of contract law undoubtedly would have been reasonable standards by which to determine the ex-

istence of a "contractual obligation" for purposes of 40 C.F.R. § 60.2(i), the fact remains that contract law principles are not the standards that were chosen by the EPA for that purpose. Therefore, we must restrict our analysis in the present case to whether the "significant liability" test contended for by EPA is a plainly erroneous interpretation of "contractual obligation."

The EPA has presented two cogent policy reasons for the use of its "significant liability" standard. The first policy argument is based on the congressional goal in § 101 of the Clean Air Act, 42 U.S.C. § 7401, of ensuring the best demonstrated system of pollution control in new sources of air pollution without requiring costly retrofitting of existing sources of pollution. *See* H.R.Rep.No. 95-294, 95th Cong., 1st Sess. 184-86 (1977), U.S.Code Cong. & Admin. News 1977, p. 1077. The EPA interpretation of "contractual obligation" effectuates this goal by requiring a commitment to construction of a polluting facility that cannot be entered into simply for purposes of avoiding the NSPS requirements while leaving the polluting company the option of cancelling or postponing the commitment with the incursion of little or no liability. Stated another way, the EPA's interpretation effectively requires the incorporation of new pollution control technology by all those who can do so without incurring "significant liability" as a result of the cancellation of a previous commitment.

The second policy reason asserted by EPA is essentially one of administrative convenience. The requirement of significant liability, based on either a cancellation fee or expenditures made in reliance on a construction contract by the contractor for a polluting facility, provides bright-line documentation by which the EPA may quickly and easily determine whether an applicant for exemption from NSPS has incurred a "contractual obligation" meriting that exemption. This interpretation thus avoids the often convoluted application of contract principles to masses of busi-

ness correspondence that would be the result under PEPCO's interpretation.

Support for this argument is amply supplied by PEPCO's contention in the present case that it is "common practice" in the utility industry for a utility to use a "letter of intent" to signify the award of a "binding contract" to a contractor for the construction of an electric generating facility and that PEPCO's "award letter" of July 12, 1971 to CE was such a letter of intent. For the EPA to find a "contractual obligation" on the basis of this contention, however, would require the EPA to gather evidence of the purported usage of trade in the utility industry and to then determine whether the "award letter" of July 12, 1971, or possibly some other piece of documentation submitted by PEPCO, comported with this "common practice." When this type of inquiry is multiplied by the number of different industries in which the NSPS regulations must be applied, the EPA's argument of administrative convenience is transformed into one bordering on administrative necessity.

PEPCO has argued that these policy considerations should be rejected as *post hoc* reasoning. This argument, however, is undercut by the EPA's consistent determination in three earlier decisions that utilities that fail to meet the requirements of the "significant liability" test will not be exempted from NSPS.

For example, upon the request of the United Illuminating Company for a determination whether its New Haven, Connecticut steam electric generating unit was subject to the NSPS for fossil fuel-fired steam generating units, *see* Letter from William J. Cooper, Chairman of the Board, United Illuminating Company to the Office of General Enforcement, Environmental Protection Agency (Feb. 29, 1972), *reprinted in* Joint Appendix at 222, the EPA originally ruled that the utility's conditional letter of intent to a manufacturer for fabrication of the facility's boiler did

not constitute a "contractual obligation," *see* Letter from William H. Megonnell, Director, Division of Stationary Source Enforcement, Environmental Protection Agency to William J. Cooper (May 9, 1972), *reprinted in* Joint Appendix at 227. It reversed this ruling, however, when the utility was able to produce a purchase order from the boiler manufacturer to a supplier of parts to be used in manufacturing the boiler. *See* Letter from William H. Megonnell to William J. Cooper (Nov. 2, 1972), *reprinted in* Joint Appendix at 230.

Similarly, in ruling on a request for a determination of NSPS applicability from Tampa Electric Company, the EPA concluded that the utility's Big Bend Unit # 3 was not subject to the relevant NSPS because the utility had incurred a "contractual obligation" based on an apparent liability to the boiler manufacturer of $950,000 as a result of certain purchase orders the manufacturer had entered with suppliers prior to August 17, 1971. *See* Memorandum from Charles A. Perry, Assistant Regional Counsel to Ron Hausmann, Office of General Counsel, Environmental Protection Agency (July 18, 1977), *reprinted in* Joint Appendix at 235-37; Memorandum from Edward B. Reich, Director, Division of Stationary Source Enforcement to Fran Phillips, Regional Counsel, Region IV, Environmental Protection Agency (Sept. 30, 1977), *reprinted in* Joint Appendix at 238-39.

Finally, in the request for determination of the Hawaiian Electric Company, the EPA was asked to rule on the applicability of the relevant NSPS to the utility's Kahe Power Plants # 5 and # 6. *See* Letter from Richard E. Bell, Manager, Environmental Department, Hawaiian Electric Company to Office of General Enforcement, Environmental Protection Agency (July 5, 1972), *reprinted in* Joint Appendix at 231-32. The cancellation date with respect to the Kahe Unit # 5 boiler was listed as "none," and with respect to the Unit # 6 boiler it was July 1, 1972. *Id.*

Based on the assumption that Hawaiian Electric could withdraw without cost from its letters of intent to construct the two boilers prior to the expiration of the stated cancellation dates, the EPA held that the utility had incurred a "contractual obligation" for the first boiler prior to August 17, 1971 but that no such obligation arose for the second boiler until July 1, 1972. *See* Letter from Edward B. Reich, Chief, Enforcement Proceedings Branch, Environmental Protection Agency to Richard E. Bell (July 18, 1972), *reprinted in* Joint Appendix at 233-34. Although the "significant liability" standard was never expressly stated in any of these previous rulings, the reasoning applied in each of the decisions is consistent with the test now articulated by the EPA.

Judicial support for the EPA's present interpretation can be found in *United States v. City of Painesville*, 431 F. Supp. 496 (N.D.Ohio 1977), *aff'd*, 644 F.2d 1186 (6th Cir. 1981), in which the court upheld an NSPS applicability ruling by the EPA that is consistent with the "significant liability" standard. In *Painesville* a municipal utility had executed a letter of intent with one boiler manufacturer in 1970, but it changed the design of the boiler to be fabricated and, on July 28, 1972, executed a contract with a second boiler manufacturer for construction of the redesigned boiler. *Id.* at 498. The EPA argued that the commencement of construction of the "affected facility" dated from either the execution of a formal contract with the boiler manufacturer or the progression of construction at the building site to the point that a change in design would have required the facility already erected to be modified in order to comply with the relevant NSPS. *Id.* at 500. Adopting EPA's definition of "commencement" as a reasonable interpretation of the NSPS applicability regulations that was in keeping with the intent of Congress in enacting § 111 of the Clean Air Act, the district court found that "construction" of the new power plant had not

"commenced" prior to August 17, 1971 because neither of the specified events had occurred prior to that time. *Id.* at 500-01. While the *Painesville* court admittedly did not construe the phrase "contractual obligation," it must be remembered that that phrase is found in the definition of "commenced" in 40 C.F.R. § 60.2(i) and that a finding of a "contractual obligation" must therefore be thought of as nothing more than a means of making the ultimate determination of whether "construction" has "commenced."

Based on the persuasive policy justifications presented by the EPA and that agency's consistent application of the "signficant liability" standard, which has been upheld by other courts, we conclude that the EPA's requirement of "significant liability" to demonstrate a "contractual obligation" sufficient to exempt a pollution source from compliance with the relevant NSPS is not a plainly erroneous interpretation of 40 C.F.R. § 60.2(i).

B.

A similar analysis can be applied to the EPA's conclusion that a power plant's boiler is the "affected facility" for which a "contractual obligation" had to exist for exemption in the present case. PEPCO contends that this interpretation is unreasonable and that the only reasonable interpretation is that "affected facility" refers to an entire electric generating facility and not just its boiler. The EPA's interpretation, however, is supported by a number of considerations.

First, EPA's interpretation comports with a tracing of the relevant regulations. "Affected facility" is equated in 40 C.F.R. § 60.2(e) with "any apparatus to which a standard is applicable." With respect to a steam electric plant, the "affected facility" to which the NSPS is applicable is "each fossil fuel-fired steam electric generating unit." *Id.* § 60.40(a)(1). "Fossil fuel-fired steam generating unit" is

in turn defined as a "furnace or boiler." Id. § 60.41(a). Thus, the definition of "affected facility" as a "boiler" seems compelled by a reading of the pertinent regulations.

Second, the EPA's present ruling that PEPCO must demonstrate that it had incurred a "contractual obligation" concerning its Unit # 4 "boiler" is consistent with the EPA's earlier NSPS exemption rulings. For example, in ruling on the request for exemption of United Illuminating Company, the EPA stated that the "pertinent issue is whether a binding agreement was entered into for the boiler, the 'affected facility' under 40 C.F.R. 60.40 and 60 41(a)." Letter from William H. Megonnell. Director, Division of Stationary Source Enforcement, Environmental Protection Agency to William H. Cooper, Chairman of the Board, United Illuminating Company (May 9, 1972), *reprinted in* Joint Appendix at 227-28. Similarly, in responding to a request for exemption by the Hawaiian Electric Company, the EPA stated that "the key question is whether construction of the K-5 and K-6 boilers commenced after August 17, 1971." Letter from Edward B. Reich, Chief, Enforcement Proceedings Branch, Environmental Protection Agency to Richard E. Bell, Manager, Environmental Department, Hawaiian Electric Company (July 18, 1972), *reprinted in* Joint Appendix at 233-34. Likewise, in reviewing its 1975 decision that Tampa Electric Company's "Big Bend No. 3 fossil fuel-fired boiler unit was an existing source for NSPS requirements," Memorandum from Charles A. Perry, Assistant Regional Counsel to Ron Hausmann, Office of General Counsel (July 18, 1977), *reprinted in* Joint Appendix at 235-37, the EPA focused its attention on the utility's "letter of intent to purchase a boiler from Riley-Stoker Company," coupled with the utility's "apparent liability to Riley-Stoker for $950,000," Memorandum from Edward B. Reich, Director, Division of Stationary Source Enforcement to Fran Phillips, Regional Counsel, Region IV (Sept. 30, 1977), *reprinted in* Joint Appendix at 238-39. Finally, in *Painesville* the EPA based its exemp-

tion determination on an examination of the time at which "construction of the 'affected facility,' the boiler, commenced," *United States v. City of Painesville*, 431 F.Supp. at 500, and the court found that examination to be "fully supported by the language of the regulation," *id.*

Third, the EPA's interpretation that the "boiler" is the "affected facility" in the instant case is consonant with the statutory definition of "stationary source" found in § 111 of the Clean Air Act, 42 U.S.C. § 7411. In *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), the District of Columbia Circuit held that the definition of "stationary source" limits the application of NSPS to individual polluting facilities rather than entire plants. At issue in *ASARCO* was a challenge to the EPA's use of the "bubble concept," under which an NSPS was applied as a result of a modification in a polluting facility only if the modification produced a net increase in the total emissions from the entire industrial plant in which a number of polluting facilities were grouped under an imaginary bubble. *Id.* at 321-25. The court rejected the "bubble concept" and held that under the § 111 definition of "stationary source" the EPA could not change the unit to which the NSPS applied "from a *single* building, structure, facility or installation—the unit prescribed in the statute—to a *combination* of such units." *Id.* at 327.

PEPCO contends, on the other hand, that the District of Columbia Circuit's holding in *Alabama Power Co. v. Costle*, 606 F.2d 1068 (D.C. Cir. 1979) (per curiam), prohibits the EPA from premising its exemption decision on an examination of the time at which construction is commenced on a "piece of equipment" such as a "boiler" rather than a "common sense industrial grouping" that is a "functional entity." Even assuming, *arguendo*, that *Alabama Power*, a decision dealing with a construction of the PSD provisions of the Clean Air Act has validity with respect to construction of similar provisions under the

NSPS portion of that Act,[2] we simply do not believe that *Alabama Power* stands for the proposition for which PEPCO has cited it.

In *Alabama Power* the court was asked to pass on the validity of the EPA's regulatory definition of "source" to include "any structure, building, facility, equipment, installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." *Id.* at 1077. The court found that the EPA had "exceeded its statutory authority by including within its definition of 'stationary source' the

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[2] The EPA's NSPS regulations are promulgated under the authority of § 111 of the Clean Air Act, 42 U.S.C. § 7411. The PSD regulations, however, find their statutory mandate in §§ 160-169 of the Act, 42 U.S.C. §§ 7470-7479. The unit to which the NSPS regulations are to apply is a "stationary source," which is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." § 111(a)(3), Clean Air Act, 42 U.S.C. § 7411(a)(3). Although the unit to which the PSD regulations are to apply is the facially different one of a "major emitting facility," that term is defined in § 169(1) of the Act, 42 U.S.C. § 7479(1), as any of a number of "stationary sources of air pollutants" that emit specified amounts of prohibited pollutants, and the *Alabama Power* court held that the definition of "stationary source" in § 111(a)(3) controlled the meaning of that term when used in the PSD part, *Alabama Power Co. v. Costle*, 606 F.2d at 1077. The court went on to point out, however, that the individual terms "facility," "building," "structure" and "installation" used to define "stationary source" in § 111(a)(3) are not defined by statute and that the EPA could define the terms differently to effectuate the different purpose of the NSPS and PSD provisions. *Id.* at 1077 n.3. Thus, the *Alabama Power* court's decision on the EPA's construction of those terms for purposes of the PSD part should be considered of little, if any, precedential value in construing the same terms for purposes of the NSPS regulations.

terms 'equipment and operation.'" *Id.* The District of Columbia Circuit went on, however, to "rule that EPA has considerable latitude in defining the four remaining terms—'structure,' 'building,' 'facility' and 'installation'—to include a wide range of pollution-emitting sources within the reach of the PSD provisions," and that "[t]o the extent EPA intended its definition of the term 'stationary source' to constitute an interpretation of the four statutory terms for purposes of the PSD part, it may recast its definition in appropriate fashion." *Id.* We believe that, with its emphasis on recasting the regulatory definition, the *Alabama Power* court intended to require only a procedural modification that would bring the EPA's regulation clearly within the discretion given that agency by the statute rather than a substantive restriction that prohibited the EPA from focusing on "equipment" or "operation" in any manner.

The *Alabama Power* court's use of the phrase "common sense industrial grouping" must similarly be reviewed in context. The EPA's previously quoted definition of "source" had been challenged as too broad by environmentalists, who relied on the District of Columbia's earlier holding in *ASARCO* that a "stationary source" could be comprised of only a single facility as opposed to a combination of facilities. *Id.* In attempting to distinguish *ASARCO* in such a way that the EPA could continue to use a definition of "stationary source" that included a combination of "sources," the *Alabama Power* court held that, while a "stationary source" could be comprised of only one "facility," the "EPA has latitude to define the term 'facility,' to encompass an entire plant or other 'common sense industrial grouping' appropriate to the PSD review and permit process." *Id.* Moreover, the court noted that the EPA had the discretion to broaden, in an appropriate fashion, its definition of "facility," which at that time was defined as " 'an identifiable piece of process equipment.' " Id. at 1977 n.14 (quoting 40 C.F.R. §§ 51.24(b)(5), 52.21 (b)(6)). Thus, although the *Alabama Power* court recog-

nized the "latitude" or "discretion" of the EPA to define "facility" as an "entire plant or other 'common sense industrial grouping,'" by negative implication it found nothing wrong with the existing definition of that term as "an identifiable piece of process equipment"—a definition that is at least as narrow as the EPA's definition of "affected facility" in the present case as the "furnace or boiler."

The salient feature of the *Alabama Power* decision that PEPCO seems to overlook is the emphasis of the District of Columbia Circuit on a definition of "facility" that is "appropriate to the PSD review and permit process." *Id.* at 1077. Indeed, the *Alabama Power* court stated in a footnote following its discussion of the EPA's "latitude" in defining terms that "the definitions applicable to each set of provisions [PSD or NSPS] must be reasonably appropriate for the purpose of those sections." *Id.* at 1077 n.14.

The EPA has, we believe, pointed out a significant difference between the PSD and NSPS programs that justifies a different construction of the definition of "stationary source" that is to be applied to the two programs. It argues that, because the purpose of the PSD program is to preserve existing air quality in those portions of the country where the air is now cleaner than the National Ambient Air Quality Standards require, the emphasis in that program should be upon the *net* emissions from an entire plant resulting from construction or modification of one or more emitting sources within the plant. The NSPS regulations, on the other hand, require the use of the best demonstrated pollution control technology in the construction or modification of a pollutant-emitting facility without regard to the effect the emisions from that facility will have on overall air quality. It is therefore appropriate in the NSPS program for the EPA to focus on the "affected facility" to which the NSPS will be applied and in which the best demonstrated technology must be incorporated. Thus, we conclude that the EPA's emphasis in its exemption decision

on the "boiler" as the "affected facility" constitutes neither too broad a definition of "stationary source" under *ASARCO* nor too narrow a definition of that term under *Alabama Power*.

Finally, and perhaps most persuasively, the EPA's requirement for exemption of a "contractual obligation" for construction of the "boiler" as the "affected facility" is supported by common sense. PEPCO contends that the EPA can base its exemption determination only on construction of a "functional entity" and that, therefore, the EPA should find an exemption if there was a "contractual obligation" for any portion of PEPCO's Chalk Point Unit # 4, including its turbine generator and the equipment and buildings it shares with Unit # 3, that is essential to its ultimate operation as a power plant. Such a construction, however, would create a means of avoidance of the NSPS that we do not believe Congress possibly could have intended. Through the simple expedient of planning generating units in tandem and providing for their use of some common equipment or facilities—a practice that utility companies seem to follow often—a utility could obtain exemption of both units from the NSPS even though it actually "commenced construction" of only one unit prior to publication of the relevant NSPS and the best demonstrated technology could be incorporated into the second unit at little or no retrofitting cost. Such a two-for-one exemption is obviously absurd, but it is the logical result of PEPCO's interpretation of the unit for which a "contractual obligation" must be incurred in order to qualify for an exemption.

We therefore conclude that it is not plainly erroneous for the EPA, in making its exemption determination, to focus on a power plant's boiler as the "affected facility" for which a "contractual obligation" had to exist prior to publication of the relevant NSPS.

C.

While we conclude that it was reasonable for the EPA to focus on the "boiler" of Unit # 4 as the "affected facility," we do not believe that construction of the equipment required to support that "boiler" is totally irrelevant to an NSPS exemption determination. The EPA contends that its regulatory definition of "construction" as "fabrication, erection, or installation of an affected facility," 40 C.F.R. § 60.2(g), refers only to "erection" or "installation" of an "affected facility" *following* its "fabrication." Although PEPCO has not expressly challenged this EPA interpretation, we believe such a challenge is implicit in PEPCO's contention that its contract with UE&C, which was responsible for preparation of the facilities that would accept the boiler, was a contract for construction of the boiler. Moreover, in response to this challenge, we find that the EPA's interpretation of its regulatory definition of "construction" is plainly erroneous.

We find that the only reasonable interpretation of the regulatory definition of "construction" is one that covers construction of those structures and facilities that are essential to the *eventual* "erection" and "installation" of an "affected facility." This finding is compelled by three considerations. First, limiting the scope of the words "erection" and "installation" to the actual erection and installation at the building site of an "affected facility" following its fabrication would render the words superfluous in the context of an NSPS exemption determination. The EPA's exemption decision would always turn on the existence of a "contractual obligation" for the "fabrication" of an "affected facility" that must necessarily precede its actual "erection" and "installation." Our interpretation, on the other hand, gives effect to all the words used to define "construction" in 40 C.F.R. § 60.2(g).

Second, the EPA's present interpretation of "construction" is inconsistent with the position taken by that agency

in *Painesville*. Before the *Painesville* court the EPA argued that the construction of the "affected facility" in that case—also a power plant boiler—commenced "when actual construction at the building site was started for a particular type of boiler, so that modification of existing physical construction would be required if the boiler specifications were changed to accommodate anti-pollution control devices. *United States v. City of Painesville*, 431 F.Supp. at 500. While [the] decision in *Painesville* turned on the reasonableness of the EPA's interpretation of its definition of "commenced" under 40 C.F.R. § 60.2(i), the EPA's present interpretation of "construction" conflicts with the position it took in *Painesville* because it has the effect of limiting examination for evidence of a "contractual obligation" to expenditures for "fabrication" of the "affected facility" and places "actual construction at the building site" outside the scope of review. Our interpretation, however, brings the EPA's definition of "construction" into consonance with its definition of "commenced."

Finally, the EPA's interpretation of "construction" is simply at odds with the congressional desire that industry not be required to institute costly retrofitting of existing facilities to accommodate the best demonstrated pollution-control technology mandated by the NSPS provisions. *See* H.R.Rep. No. 95-294, 95th Cong., 1st Sess. 184-86 (1977). As PEPCO has persuasively pointed out, the major expenditures incurred in incorporating new emission control technology into an electric generating unit are for expansion of buildings and modification of equipment that support an "affected facility" rather than for modification of the "affected facility" itself. Therefore, it would clearly thwart the legislative intent to look only at the "contractual obligation" for "fabrication" of the boiler in determining whether a utility's "construction" of a new generating facility had "commenced" to such an extent that it would be unreasonable to require the utility to modify that facility to accommodate new emission control technology. Our own

interpretation, to the contrary, effectuates the congressional purpose in enacting the NSPS provisions by broadening the scope of examination of "construction" of an "affected facility" to include "contractual obligations" for the construction of facilities essential to the *eventual* "erection" and "installation" of an "affected facility."

III

Having passed on the validity of the EPA's interpretation of the regulations essential to decision in the present case, we now turn to the question whether the regional administrator's ultimate decision denying an exemption to PEPCO was arbitrary, capricious or an abuse of discretion. *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Although we note two flaws in the reasoning on which the regional administrator based his decision, we do not think that decision was an abuse of discretion inasmuch as our correction of the flaws does not change the ultimate result.

The regional administrator erred first in stating that it has been the "EPA's consistent interpretation of the term 'contractual obligation' in previous NSPS determinations" that it be demonstrated by an agreement that, if terminated, would result in a "substantial loss." 45 Fed.Reg. at 20,156. As we have already found, the requirement to be discerned from prior EPA decisions is one of "significant liability" rather than "substantial loss."[3] However, while we think that it is important to note the distinction be-

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[3] The regional administrator's use of the phrase "substantial loss" is understandable because that was the term used in an internal agency memorandum directed to the regional administrator in March 1980. *See* Joint Appendix at 199-200. We do not believe, however, that the term was used in that *memorandum* or in the regional administrator's decision as a shorthand reference to the "substantial loss" standard that the EPA has applied in exempting sources from the PSD requirements. *See, e.g., Montana Power Co. v. EPA,* 608 F.2d 334, 340 (9th Cir. 1979). To the

tween the two standards, we find that it has no effect on the validity of the regional administrator's ultimate decision in the present case because PEPCO has failed to demonstrate liability for construction of any sort, much less liability lying between "significant" and "substantial."

The regional administrator's other error was in restricting his examination for a "contractual obligation" for "construction" of the "affected facility" to PEPCO's possible liability for fabrication of the boiler itself. Under what we have determined to be the appropriate interpretation of "construction," as defined in 40 C.F.R. § 60.2(g), the regional administrator should have broadened the scope of his inquiry to include "contractual obligation" for the construction of structures and equipment essential to the eventual "erection" and "installation" of the "affected facility." Again, however, correction of this flaw in the regional administrator's decision has no effect on the ultimate exemption determination.

PEPCO has contended that, even if it had not incurred a "contractual obligation" for "fabrication" of the boiler by CE prior to the August 17, 1971 publication of the rele-

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contrary, the discussion of EPA policy in which the term is used in the March 1980 memorandum, *see* Joint Appendix at 199, as well as the more detailed discussion in another memorandum directed to the regional administrator, *see* Memorandum from R. Sarah Compton, Director, Enforcement Division to Jack J. Schramm, Regional Administrator (March 7, 1980) *reprinted in* Joint Appendix at 174-98, clearly articulate a standard for establishing a "contractual obligation" that the EPA now refers to as one of "significant liability." Therefore, we regard the regional administrator's reference to "substantial loss" as a loose use of technical language rather than the application of a new and higher requirement for establishing a "contractual obligation." Moreover, even were the phrase used in the latter sense, as our subsequent discussion in text demonstrates, this error did not affect the ultimate outcome.

vant NSPS, it had, prior to that date, entered into "contractual obligations" with GE for construction of the turbine-generator and with UE&C for the on-site construction of the entire Chalk Point Unit # 4 facility. Because construction of the turbine-generator is not essential to the eventual "erection" and "installation" of the boiler, PEPCO's negotiations with GE are irrelevant under even our interpretation of "construction."

PEPCO's possible "contractual obligation" to UE&C, on the other hand, is clearly relevant to the exemption determination in the instant case. PEPCO has failed, however, to produce any evidence of liability to UE&C for "construction" of the on-site structure essential to the eventual support of the boiler prior to August 17, 1971. At best, PEPCO can only point to "engineering work, project design and construction management" that UE&C had performed prior to publication of the relevant NSPS. As the *Painesville* court noted, however, "if the only work made fruitless by the need to meet antipollution standards is in the design or planning of a new course, then operators are required to modify those designs or operating plans to meet new stationary source emission standards," and such an interpretation "is given credence by Congress' use of the word 'construction' in [§ 111(a)(3)] rather than the words 'planning' or 'designing.'" *United States v. City of Painesville,* 431 F.Supp. at 501 n.8. Because PEPCO has been unable to produce any evidence of "significant liability" to UE&C for actual construction at the Unit # 4 site prior to August 17, 1971, we believe that the regional administrator's failure to consider that possibility is inconsequential.

With the modifications indicated, we affirm the decision of the EPA's regional administrator denying exemption of PEPCO's Chalk Point Unit # 4 from compliance with the relevant NSPS published by the EPA on August 17, 1971.

AFFIRMED AS MODIFIED.

APPENDIX B

Environmental Protection Agency, Determination of Applicability of New Source Performance Standard (NSPS) to Potomac Electric Power Co. (PEPCO) Chalk Point Unit 4, 45 Fed. Reg. 20,155-56 (March 27, 1980)

Notice is hereby given that the Environmental Protection Agency (EPA) has determined that the Standards of Performance for Fossil Fuel-Fired Steam Generators proposed August 17, 1971 (40 CFR Part 60 Subpart D) apply to the Potomac Electric Power Company (PEPCO) Chalk Point Unit 4. EPA has determined, in response to PEPCO's request pursuant to regulation 40 CFR 60.5, that PEPCO's actions prior to August 17, 1971 did not constitute the commencement of construction as defined in the regulations in 40 CFR Part 60. What follows is the basis for this determination.

Section 111 of the Clean Air Act requires EPA to set technology based standards of performance for new sources of air pollutants. These New Source Performance Standards (NSPS) are promulgated for categories of sources which "cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare."

Section 111(a)(2) of the Clean Air Act defines "new source" for the purposes of NSPS to be: any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

Regulation 40 CFR 60.1 states that the provisions of 40 CFR Part 60 "Standards of Performance for New Stationary Sources": apply to the owner or operator of any stationary source which contains an affected facility, the construction or modification of which is commenced after

the date of publication in this part of any standard (or, if earlier, the date of publication of any proposed standard) applicable to that facility.

The term "affected facility" is defined in regulation 40 CFR 60.2(e) as: "with reference to a stationary source, any apparatus to which a standard is applicable."

The term "construction" is defined in regulation 40 CFR 60.2(g) as: "the fabrication, erection, or installation of an affected facility."

The term "commenced" is defined in regulation 40 CFR 60.2(i) as: an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

Regulation 40 CFR Part 60 Subpart D "Standards of Performance for Fossil Fuel Fired Steam Generators" was proposed on August 17, 1971 (36 FR 15704). The affected facility to which the provisions of this Subpart apply, pursuant to regulation 40 CFR 60.40(a), is the "fossil fuel-fired steam generating unit" which is defined in regulation 40 CFR 60.41(a) as: "a furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer."

The issue presented is whether PEPCO commenced construction of the boiler for Chalk Point Unit 4 prior to August 17, 1971, the proposal date for the applicable NSPS. If construction had not commenced, the unit would be a new source and subject to the NSPS requirements.

PEPCO has not taken the position that it commenced construction by undertaking a continuous program of construction, but that it commenced construction by entering into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction. EPA has reviewed all or [sic] the information

submitted by PEPCO and has concluded that PEPCO did not enter into a contractual obligation for the boiler for Chalk Point Unit 4 prior to August 17, 1971.

PEPCO and Combustion Engineering, Inc. (CE) began negotiations for the fabrication of what would eventually be the boiler for Chalk Point Unit 4 as early as August 1970. These negotiations continued through the first half of 1971 with CE providing price quotations and reserving production schedule space for the unit. On July 12, 1971 PEPCO sent a letter to CE expressing the intent to award the unit to CE "subject to a mutually satisfactory contract" and requesting from CE "copies of the Chalk Point No. 4 proposal as soon as possible after out [sic] engineering meeting with you on August 3, 1971.

On October 26, 1971 CE prepared a two (2) page "Contract Abstract" for Chalk Point Unit 4 which included descriptions of the major boiler components, the total price, and shipping and payment conditions. The final contract for the unit was signed on April 18, 1973.

EPA's consistent interpretation of the term "contractual obligation" in previous NSPS determinations has been that it can be in the form of a formal contract or an agreement which, if terminated, would result in a substantial loss due to an agreed upon cancellation fee after a date certain or due to an apparent liability to the manufacturer of the affected facility for actions taken in reliance upon the agreement. PEPCO and CE did not have a formal contract for the boiler until April 18, 1973. PEPCO has not been able to show by any documentation that there existed a cancellation date beyond which PEPCO could not terminate the agreement without incurring a cancellation fee. PEPCO has also not provided any documentation to show that they had incurred any apparent liability to CE for any action taken by CE in reliance upon the agreement.

PEPCO did not enter into a contractual obligation for the construction of the boiler for Chalk Point Unit 4 prior

to August 17, 1971. PEPCO, then, did not commence construction prior to that date so Chalk Point Unit 4 is a new source for NSPS purposes and is subject to the requirements of 40 CFR Part 60 Subpart D.

This determination is reviewable under Section 307(b)(1) of the Clean Air Act in the United States Court of Appeals for the appropriate circuit. A petition for review must be filed on or before May 27, 1980.

Dated: March 13, 1980.

Jack J. Schramm,

Regional Administrator, Region III.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1255

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

vs.

ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS M. COSTLE, Administrator, and JACK J. SCHRAMM, Regional Administrator, Environmental Protection Agency, *Respondents.*

On Petition for Review of an Order of the Environmental Protection Agency

(Filed June 4, 1981)

THIS CAUSE came on to be heard upon the petition of Potomac Electric Power Company for review of an order issued by the Environmental Protection Agency on March 27, 1980; and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged, and decreed by the United States Court of Appeals for the Fourth Circuit, that the order be, and it is hereby affirmed as modified, consistent with the opinion of this Court filed herewith.

/s/ WILLIAM K. SLATE II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1255

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

versus

ENVIRONMENTAL PROTECTION AGENCY, et al, *Respondents.*

ORDER

(Filed August 25, 1981)

Upon consideration of the petitioner's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Phillips for a panel consisting of Judge Widener, Judge Phillips, and Judge Ervin.

For the Court,

/s/ WILLIAM K. SLATE II
Clerk

APPENDIX D

Administrative Procedure Act § 551, provides, in relevant part:

5 U.S.C. § 551. Definitions

For the purpose of this subchapter—

• • • • • • • • • •

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

• • • • • • • • • •

Administrative Procedure Act § 553, provides, in relevant part:

5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules

are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

• • • • • • • • • • •

Clean Air Act, § 7411, provides, in relevant part:

42 U.S.C. § 7411. Standards of performance for new stationary sources

(a) *Definitions*

For purposes of this section:

(1) The term "standard of performance" means—

(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) of this section applies, a standard—

(i) establishing allowable emission limitations for for such category of sources, and

(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have re-

sulted from the use of fuels which are not subject to treatment prior to combustion.

* * * * * * * * * *

For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. * * *

* * * * * * * * * *

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

* * * * * * * * * *

Code of Federal Regulations Title 40 § 60.1, provides, in relevant part:

Subpart A—General Provisions

§ 60.1 Applicability.

Except as provided in Subparts B and C, the provisions of this part apply to the owner or operator of any stationary source which contains an affected facility, the construction or modification of which is commenced after the date of publication in this part of any standard (or, if earlier, the date of publication of any proposed standard) applicable to that facility.

Code of Federal Regulations Title 40 § 60.2, provides, in relevant part:

§ 60.2 Definitions.

The terms used in this part are defined in the Act or in this section as follows:

* * * * * * * * * *

"Commenced" means, with respect to the definition of "new source" in Section 111(a)(2) of the Act, that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete within a reasonable time, a continuous program of construction or modification.

* * * * * * * * * *

"Construction" means fabrication, erection, or installation of an affected facility.

* * * * * * * * * *

"Existing facility" means, with reference to a stationary source, any apparatus of the type for which a standard is promulgated in this part, and the construction or modification of which was commenced before the date of proposal of that standard; or any apparatus which could be altered in such a way as to be of that type.

* * * * * * * * * *

Code of Federal Regulations Title 40 § 60.5, provides, in relevant part:

§ 60.5 Determination of construction or modification.

(a) When requested to do so by the owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.

(b) The Administrator will respond to any request for a determination under paragraph (a) of this section within 30 days of receipt of such request.

Opposition

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No. 81-955

In the Supreme Court of the United States

OCTOBER TERM, 1981

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency, in attempting to determine whether a particular power plant must comply with the new source performance standards provided for in the Clean Air Act, 42 U.S.C. (Supp. III) 7411, is prohibited from interpreting its regulations in accordance with a consistent approach applied to other new sources, solely because that interpretation is not embodied in a specific, definitional regulation.

2. Whether the agency's delay in deciding whether petitioner's power plant was subject to the new source performance standards precluded the agency from requiring petitioner to comply with those standards when petitioner was responsible for most of the delay, declined to avail itself of judicial remedies for terminating the delay and has suffered insubstantial hardship.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 650 F. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1981. A petition for rehearing was denied on August 25, 1981 (Pet. App. 30a). The petition for a writ of certiorari was filed on November 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 111(b)(1)(B) of the Clean Air Act, 42 U.S.C. (Supp. III) 7411(b)(1)(B), requires the Administrator of the Environmental Protection Agency (EPA) to establish maximum allowable emission standards, called "standards of performance," limiting the air pollution permitted from "new sources." A new source is defined as a stationary source

on which "construction" was "commenced" after the standard of performance for the source was published in proposed or final form. Section 111(a)(2), 42 U.S.C. (Supp. III) 7411(a)(2). Stated simply, if a company commences construction of a new source of pollution after the agency has proposed a standard applicable to that type of source, the new source is subject to the standard.

Section 111 does not specify what constitutes "commencement of construction." But EPA through its regulations has established clarifying definitions. "Construction" means the "fabrication, erection or installation of an affected facility". 40 C.F.R. 60.2.[1] "Commenced" means "that an owner or operator has undertaken a continuous program of construction or modification [of the affected facility] or * * * has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification." *Ibid.*

The term "contractual obligation" is not defined in the regulations, but the agency has developed an interpretation of the term in deciding whether pollution sources of various companies were required to comply with the new standards. The agency consistently has required the company to show a commitment to a contractor for the construction of the new source that, if cancelled, would impose upon the owner a "significant liability" (Pet. App. 10a-12a). This interpretation was adopted primarily to assure that a new source owner could not evade the performance standards by the simple expedient of entering into a vague construction agreement that could be revoked by either party without adverse consequence (*id.* at 9a).

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[1] "Affected facility" is the agency's term for the pollution source covered by the standard. 40 C.F.R. 60.2.

EPA proposed the new source performance standards at issue here on August 17, 1971 (36 Fed. Reg. 15704), and promulgated the final standards on December 23, 1971. See 36 Fed. Reg. 24876; 40 C.F.R. 60.40 to 60.46. Under the regulations, EPA will determine upon request whether a proposed facility is subject to the standard. See 40 C.F.R. 60.5.

2. On May 20, 1977, nearly six years after the agency proposed the new source standard involved in this case, petitioner submitted to EPA's Regional Office in Philadelphia a request for a determination of whether "construction" of its Chalk Point Unit No. 4 boiler "commenced" before August 17, 1971, the proposal date for the relevant standard.

In March 1980, after a careful review of the documents relating to the construction of the boiler—documents supplied by petitioner over a substantial period of time—the Regional Administrator issued his final decision that the boiler is a new source subject to the standards (Pet. App. 25a-28a). He explained that petitioner had neither begun actual construction of the boiler nor entered into a "contractual obligation" to construct the boiler before the standards were proposed on August 17, 1971 (*id.* at 26a-27a). This latter finding involved the application of the agency's interpretation of "contractual obligation" to the facts of this case. The Regional Administrator determined that there was no evidence that the agreements petitioner had entered into with various contractors for the construction of the Chalk Point Unit No. 4 boiler prior to August 17, 1971, included any cancellation fees or created any liability for petitioner from commitments of resources by the contractor in reliance on those agreements (Pet. App. 27a-28a).

3. The court of appeals affirmed (Pet. App. 1a-28a). Initially, it found that petitioner was estopped to complain about the agency's delay in deciding whether petitioner's boiler was subject to the new source performance standard

because of its own delay in requesting a ruling on the issue (*id.* at 2a n. 1). It then held that the agency's interpretation of its regulations as respects all matters relevant to the petition in this case was permissible. Specifically, it concluded that the agency's reliance on a "significant liability"[2] test for determining the existence of a contractual obligation was fully supported by the purpose of the statute and administrative convenience (*id.* at 9a-10a) and that this test had been consistently used by the agency in deciding whether the standards applied to other new sources of pollution (*id.* at 10a-12a).

ARGUMENT

1. Petitioner contends (Pet. 11-18) that the agency should not have been allowed to apply the "significant liability" test to this case because the interpretation of the regulation had not yet been incorporated into a final regulation of its own. This position is wholly inconsistent with time honored principles of administrative law established by this Court. It has been hornbook law since at least *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947), that the "choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." 332 U.S. at 203. See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

Indeed, the reasons for granting an agency this discretion are well illustrated by this case. The agency has been delegated broad authority to implement the new source performance standards and to that end it has adopted extensive regulations. Obviously, the agency cannot, a priori, define

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[2]The court noted that the Regional Administrator had mistakenly used the term "substantial loss" in the letter communicating the decision to petitioner (Pet. App. 22a). The court found this error insignificant in this case because there was no evidence that petitioner would have incurred *any* liability by withdrawing from the agreements entered into prior to August 17, 1971 (*id.* at 23a).

every term in every regulation. It must be left to case-by-case adjudication to work out the details. The term "contractual obligation" is, as the court of appeals recognized (Pet. App. 8a-9a), susceptible to more than one reasonable interpretation. It is only after experience with applying the rule has been accumulated (which in this case showed that the agency's approach is both administratively convenient and in furtherance of the policies to be served by the statute (Pet. App. 9a)) that a more general approach, through rulemaking, is reasonable. See *SEC* v. *Chenery Corp., supra*, 332 U.S. at 201-203.[3]

Petitioner also asserts (Pet. 11-12) that the agency has proposed to adopt by regulation the same standard that was applied in this case and that the pre-promulgation use of that standard violates the requirement that rules be given prospective effect only. See *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). Petitioner's reliance on the EPA's proposed regulation defining "contractual obligation" is misleading. Under the proposed amendment, to show a "contractual obligation" an owner would have to show a binding agreement imposing a "substantial loss" on cancellation. 44 Fed. Reg. 31596-31597 (1979). The test applied under the existing definition for new source performance standards, and applied in this case, is the "significant liability" test, which is less stringent than the "substantial loss"

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[3]The only limitation on this approach is that the agency generally must be consistent in its treatment of each case or explain adequately the reasons for departing from its prior decisions. See *Atchison, T. & S.F. R.R.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *Greater Boston Television Corp.* v. *FCC*, 444 F. 2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971). As the court of appeals found, EPA has consistently applied the "significant liability" test in its prior determinations of whether the performance standards were applicable to other new sources of pollution (Pet. App. 10a-12a). Thus, petitioner has no basis for complaining about the use of that standard in this case.

test.[4] Obviously, a proposal to substitute a different, more exacting, test in no way implies that the existing test is inappropriate.[5]

Petitioner also asserts (Pet. 11-12) that EPA's use of the "significant liability" test in this case conflicts with Congress' understanding of the term "contractual obligation." Petitioner's reliance on the legislative history of the "prevention of significant deterioration" (PSD) program under the Clean Air Act is misleading. The 1977 Senate Committee Report excerpt petitioner quotes (Pet. 6), when read in context, indicates only that it was Congress' view that EPA has not always applied the "substantial loss" test under its PSD program. S. Rep. No. 95-127, 95th Cong., 1st Sess. 32 (1977). Congress has never indicated that under the new source performance standards program the term "contractual obligation" does not include a "significant liability" test.

2. Petitioner next argues (Pet. 18-22) that EPA should have been estopped to apply the performance standards to its Chalk Point Unit No. 4 boiler because of the agency's failure to make the "new source" determination within the time provided in EPA's regulations. 40 C.F.R. 60.5. The court of appeals properly rejected this fact-bound claim and its decision warrants no further review by this Court.

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[4]As the terms have been applied by the agency, the key difference is that a penalty clause in an agreement would normally satisfy the "significant liability" test, but such a clause would not normally be sufficient under the "substantial loss" standard.

[5]There is no comparison between the decision in this case and *Patel* v. *INS*, 638 F. 2d 1199 (9th Cir. 1980) or *Ford Motor Co.* v. *FTC*, 654 F. 2d 599 (1981) (withdrawn from publication), relied upon by petitioner (Pet. 15-18). Neither of those cases involved an agency's application of specific, preexisting language in a regulation to a particular case that is fully consistent with prior agency action on the identical issue. In *Ford Motor Co.*, the FTC applied for the first time an interpretation of general statutory language. In *Patel*, the INS used a test it had eliminated expressly when it promulgated the underlying regulation.

As the court of appeals noted (Pet. App. 2a n.1), petitioner unreasonably delayed for nearly six years before requesting administrative action. Moreover, after requesting a determination, petitioner, for reasons known only to itself, declined to pursue the available judicial remedies for unwarranted delay. See 5 U.S.C. 706(1); 42 U.S.C. (Supp. III) 7604(a)(2). See also *Kennecott Copper Corp.* v. *Train*, 572 F. 2d 1349 (9th Cir. 1978). Having failed to pursue effective avenues of redress prior to the agency's decision, petitioner properly was denied post hoc relief from an otherwise proper agency determination.[6]

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[6] We also note that nothing in the record supports petitioner's claim of significant injury resulting from the delay. At most, the company now claims merely that the delay beyond 1979 "created doubt that [petitioner] could comply by any means, including purchase of low-sulfur fuel" (Pet. 21 n.15). Petitioner, however, admitted in its petition for rehearing to the court of appeals that it can meet the standards by burning low-sulfur fuel within four months of the date it receives the low-viscosity pumps ordered in 1981 and projected to arrive September 1, 1981 (Petition for Rehearing 2). Moreover, it appears that the increased cost of complying about which petitioner complains is attributable to the application of the performance standard itself and not to the agency's delay in making the applicability determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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ENVIRONMENTAL PROTECTION AGENCY,
ANNE M. GORSUCH, Administrator, and
PETER N. BIBKO, Regional Administrator,
Environmental Protection Agency,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF OF PETITIONER

I

The words "significant liability" do not appear in the governing statute or in EPA's regulations. Nor have these words been used in any EPA ruling.* They first appeared in the government's brief in the Court of Appeals. In that brief the government abandoned the Regional Administrator's "substantial loss" test in an attempt to deflect the awkward fact that, in a then-pending (and still-pending) rulemaking action, EPA had proposed to revise the applicable regulation to contain the very words which the Regional Administrator used in describing the liability requirement on which his decision concededly turns.

The Brief in Opposition carries this *post hoc* argument another step. It argues that EPA elected to use adjudication procedures in creating the "significant liability" requirement in order to accumulate experience before promulgating a rule. (Br. in Opp. 4-6.) For added protection, the agency's three-year-old rulemaking is now described by the government as "a proposal to substitute a different, more exacting, test . . . ." (*Id.* at 6.)

If EPA had understood its existing requirements to include "significant liability" when the 1979 rulemaking notice was issued, it defies belief that the agency would not have said so in its 900-word preamble describing the background, purpose and effect of the proposed rule and its relationship to existing

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*The Court of Appeals acknowledged that prior EPA rulings have not explicitly applied a "significant liability" test (Pet. App. 12a). The court was wrong in stating that three earlier rulings can be read as "consistent with the test now articulated by the EPA" (*id.*), but the question of consistency with earlier rulings is irrelevant to the issues which the petition seeks to have reviewed. Thus, the Ninth Circuit in *Patel* required the agency to proceed by rulemaking although the challenged requirement had been imposed in prior adjudications (*see* Pet. 15-17).

requirements. *See* 44 Fed. Reg. 31596 (May 31, 1979). The rulemaking notice indicates that the words "substantial loss" were used to accommodate an influential member of Congress who had expressed the view that the NSPS definition of "commenced" should be the same as Congress' 1977 definition of that word for a different purpose. *See id. See also* 42 U.S.C. § 7479(2)(A). However, the proposal makes no sharp distinction between "significant" and "substantial." It indicates, for example, that the new "substantial loss" requirement would be satisfied by "significant cancellation penalties." *See* 44 Fed. Reg. at 31596. The proposal was plainly intended to solicit comments concerning the general desirability of adding a loss or liability requirement. EPA obviously did not believe that it was proposing merely to modify an existing liability requirement.

II

The Brief in Opposition correctly asserts that agencies have discretion to defer detailed prescriptions in order to acquire "accumulated experience" through *ad hoc* applications of general standards. (*Id.* at 5.) However, this premise cannot justify the creation of new requirements not fairly contained within the general purview of existing rules. If agencies have discretion to issue adjudicative orders which do not merely interpret but rather augment existing prescriptions, no limit would exist on an agency's power to ignore rulemaking procedures. The decisions of this Court do not support any such unlimited discretion. (*See* Pet. 13-15.) What the EPA has done here cannot pass as interpretation and is in fact indistinguishable from the action recently disapproved by the Ninth Circuit in the *Patel* case. (*See* Pet. 15-17.)

III

At several places, the Brief in Opposition argues that considerations of policy support the EPA's use of a "significant

liability" test (*id.* at 2, 4-5). These claims are specious. For present purposes, it is sufficient to point out that the overriding purpose of Congress in authorizing NSPS was to spur the development of advanced emission control technology. To include projects which have proceeded beyond the design phase when the NSPS is issued not only violates Congress' desire to avoid disruption and delay costs but also diminishes or eliminates the desired "technology-forcing" effect. Faced with long delays or large retrofit costs, a facility owner will usually comply by purchasing low-sulfur fuel. Indeed, in this case EPA's three-year delay in issuing its ruling precluded the use of emission control technology as a method of compliance. (*See* Pet. 21, n. 15; Br. in Opp. 7, n. 6.)

Since compliance with NSPS would be a moot issue if the plant's emissions caused any known adverse effect (*see* Pet. 4), the principal effect of the ruling is to increase electricity costs by requiring this plant to burn a more expensive fuel oil. The congressional policy of compelling new sources to employ improved emission control technology is not advanced by the ruling in any way.

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